

63 FLRA No. 177

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES DEPARTMENT OF VETERANS
AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-4195

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DECISION

August 13, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator Jerome H. Ross filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition.

The Arbitrator denied the grievant's claim for reimbursement under the Agency's Education Debt Reduction Program (EDRP).¹ For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant, a medical technologist, was employed by the Agency from May 2004 until May 2006. During the summer of 2005, the grievant learned about the Education Debt Reduction Program (EDRP). The EDRP is an initiative "designed to enhance the recruitment and retention of health professionals that are required to meet the staffing needs of the [Veterans Health Administration] VHA." Award at 3. The EDRP is set forth in VHA Handbook 1021.1.² See *id.* at 9-10. The EDRP reimburses payments made on student loans for employees in hard to fill professions as long as the

education is relevant to the degree required for the job. See *id.* at 9. Normally, employees apply for EDRP when they begin to work for the Agency. When the grievant learned about the program, she applied for reimbursement. Shortly thereafter, the Agency notified the grievant that she was not eligible for the EDRP because she had not applied within the first six months of her employment. The grievant filed a grievance claiming that she did not apply earlier because the Agency did not inform her of the program at the time of her recruitment. The Agency acknowledged that the grievant may not have received information about the program and that as a result, the grievant's application would be accepted without regard to timeliness. Thereafter, the grievant filed her application. However, the reimbursement was denied because, according to the Agency, local management had not listed her occupation as hard to fill in the May 31, 2002 announcement of the EDRP. A grievance was filed, and when it was not resolved it was submitted to arbitration.

As relevant here, the Arbitrator framed the issue as: "Whether the Agency violated the Master Agreement [CBA] and a previous grievance decision when it denied the grievant's application for EDRP reimbursement; and if so, what is the appropriate remedy?"³

Award at 11.

Before the Arbitrator, the Union argued that the Agency violated the CBA and regulation by refusing to consider the grievant for the EDRP. *Id.* at 15. The Agency argued that the EDRP "requires facility reviews of the occupations allowed to participate at the facility level" and that "it also requires a local announcement of the program, including the listing of eligible occupations at the facility level." *Id.* at 17. The Arbitrator interpreted and applied VHA Handbook 1021.1, in particular Parts 4 and 5, and found that under the VHA Handbook 1021.1, the "facility [d]irector" was responsible for the implementation and management of the EDRP, and that therefore, it was the facility director's responsibility to announce the educational assistance opportunities under the EDRP. *Id.* at 18. The Arbitrator also found that the Union failed to show that prior announcements published by the Richmond facil-

2. VHA Handbook 1021 provides specific direction, guidance and procedures for the administration of the EDRP at Veteran Health Administration (VHA) facilities. See Attachments to Union's Exceptions. The relevant provisions of VHA Handbook 1021.1 are set forth in the Appendix to this decision.

3. Issues concerning the timeliness of the grievance were also before the Arbitrator. However, no exceptions were filed to the Arbitrator's resolution of these issues.

1. The EDRP is codified in Title 38 §§ 7681 and 7683.

ity contained all of the occupations designated in VHA Handbook 1021.1. *See id.* Specifically, the Arbitrator found that the May 31 announcement listed only “nine occupations.” *Id.* Finally, the Arbitrator found that, in the past, the Richmond facility had made local determinations concerning difficult to recruit positions. *See id.* at 18-19. Therefore, the Arbitrator concluded that the Union failed to show that the local facility had no discretion in determining EDRP eligible occupations. *See id.* at 18.

Additionally, the Arbitrator credited an e-mail from an Agency employee at the Healthcare Retention and Recruitment Office (HRRO) in New Orleans -- the office with responsibility for EDRP management -- which noted that the grievant’s application should not have been accepted because her occupation was not listed in the EDRP May 31 announcement. *See id.* at 19. The Arbitrator concluded that “absent any evidence of a national or regional policy or practice to the contrary” he could not credit “the Union’s reading of the [VHA Handbook] 1021.1 requirement over the directive of an HRRO employee with responsibility for EDRP management.” *Id.* Based on his findings, the Arbitrator denied the grievance.

III. Union’s Exceptions

The Union argues that the award violates the “regulations controlling the program and laid out in the handbook for the program.” Exceptions at 3. The Union claims that EDRP is funded at the “national level” and that under the VHA Handbook 1021.1 “local applicants are supposed to be considered and evaluated on their merits as a national matter and not the local facility.” Exceptions at 4. The Union asserts that there is no evidence of a past practice based on local determination of “hard to fill” positions. *Id.* The Union also asserts that the VHA Handbook does not “state[] that to be eligible, a determination must or can be made by the local facility. . . .” *Id.* at 5. According to the Union, the VHA Handbook states that “[f]unding for EDRP is centralized.” *Id.* The Union also asserts that the award “ignores” the CBA. *Id.* at 6.

IV. Analysis and Conclusions

A. The award is not contrary to VHA Handbook 1021.1.

The Union argues that the Arbitrator erred in his interpretation of the VHA Handbook 1021.1 because the list of occupations eligible for the EDRP is determined at the national, rather than at the local, level.

Section 7122(a)(1) of the Statute pro-

vides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation. For purposes of § 7122(a)(1), the term “regulation” includes governing agency regulations. *See United States Dep’t of Transp., Fed. Aviation Admin., Wash., D.C., 58 FLRA 23, 25 (2002)* (citation omitted). As the Union’s exception challenges the award’s consistency with VA Handbook 1021.1 -- the Agency handbook containing directions, guidance and procedures for the administration of the EDRP -- we review the question of law raised by the exception *de novo*. *See AFGF, Local 1203, 55 FLRA 528, 530 (1999)*. In so doing, the Authority will determine whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation. *United States Dep’t of the Treasury, Internal Revenue Serv., Ogden Serv. Ctr., Ogden, Utah, 42 FLRA 1034, 1056-57 (1991)*. In applying a standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law, based on the arbitrator’s underlying factual findings. *NFFE, Local 1437, 53 FLRA 1703, 1710 (1998)* (*NFFE, Local 1437*). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *See id.*

The VHA Handbook 1021.1 sets forth the directions, guidance and procedures for the administration of the EDRP. *See* Transmittal Letter, VHA Handbook 1021.1, attached to Union’s Exceptions. The Arbitrator denied the merits of the grievance based on his conclusions that the Union failed to show that the local facility had no discretion to determine EDRP eligibility for occupations listed in the VHA Handbook 1021.1.

In support of his conclusion, the Arbitrator found that under the VHA Handbook 1021.1, the facility director is responsible for the implementation and management of the EDRP, and that therefore, it is the facility director’s responsibility to announce the educational assistance opportunities under the EDRP. *See* Award at 18. The Arbitrator also found that the Union failed to show that prior announcements published by the Rich-

mond facility contained all of the occupations designated in VHA Handbook 1021.1. *See id.* Specifically, the Arbitrator found that the announcement issued in 2002 listed only nine occupations. *See id.* Finally, the Arbitrator found that, in the past, the Richmond facility had made local determinations concerning difficult to recruit positions. *See id.* 18-19. In this connection, we find that the Arbitrator's factual findings support his conclusion that the Union failed to show that the local facility had no discretion to determine the occupations listed in the May 31 EDRP announcement. As the Union has not challenged the Arbitrator's factual findings, we defer to the Arbitrator in this regard. *See NFFE, Local 1437*, 53 FLRA

at 1710. Consequently, we find that the Union has not demonstrated that the Arbitrator erred in his interpretation of the VHA Handbook 1021.1. *See NTEU*, 63 FLRA 70, 72-73 (2009) (where the Authority denied the union's contrary to law exceptions based on factual findings not challenged by the union). Accordingly, we deny the Union's exception.

B. The award draws its essence from the CBA.

We construe the Union's argument that the award ignores the CBA as a claim that the award fails to draw its essence from the agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

In this case, the Union has failed to provide any argument to support its claim that the award fails to draw its essence from the CBA. When a party fails to provide any arguments or authority to support its exception, the Authority will deny the exception as a bare

assertion. *See United States Dep't of Homeland Sec., United States Customs and Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004). Accordingly, we deny the Union's exception.

V. Decision

The Union's exceptions are denied.

Appendix

Relevant Provisions of VHA Handbook 1021.1

2. AUTHORITY

b. This authority permits VA to provide education debt reduction payments to employees with qualifying loans who occupy positions providing direct-patient care services or services incident to direct-patient care services for which recruitment and retention of qualified personnel is difficult. For the purposes of this program, these positions are limited to the following: . . . (21) Medical technologist. . .

4. RESPONSIBILITY

a. Health Care Staff Development and Retention Office (HCSDDRO) Responsibility.

The Director, HCSDDRO, is responsible for national implementation and management of EDRP. This includes:

- (2) Allocating funds to facilities and Veterans Integrated Service Networks (VISNs). . .
- (4) Monitoring facility and VISN compliance with applicable directives.

b. Facility Responsibility

(1) Facility Director. The facility Director is responsible for local-level EDRP implementation and management consistent with VA and VHA directives. More specifically, the facility Director is responsible for: . . .

(b) Identifying a Program Coordinator and estab-

lishing a selection committee.

(c) Publishing an open continuous announcement about

educational assistance opportunities under EDRP.

(d) Forwarding the applications of candidates that are recommended for program participation to HCS-DRO.

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5. ELEGIBILITY

a. An employee must meet specific eligibility requirements to participate in EDRP. To be eligible for participation, the individual:

(I) Must be a recently appointed VITA employee serving in one of the following positions: . . . (u) Medical technologist.

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7. FUNDING

a. Funding for EDRP is centralized. HCS-DRO is responsible for managing the funding process consistent with available funds, overall VHA goals and identified health care staffing needs. Education debt reduction awards are based on the availability of funds and Department need. Debt reduction awards are prioritized to allow as many employees (who have outstanding loans for education or training in specified health care disciplines for which recruitment or retention is difficult) as possible to receive them.

b. Health care facilities and VISNs need to submit the applications of candidates whom they wish to recommend for education debt reduction awards to HCS-DRO based on current or anticipated difficulties in filling health care positions covered by EDRP.

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e. Local and national staffing issues must be considered in making effective EDRP funding decisions. Factors affecting funding include, but are not limited to the following:

(1) VISN and/or Facility Issues

(a) VISN and/or facility health care staffing needs (current and anticipated) by priority.

(b) Workload.

(c) Length of time it takes to fill vacant positions.

(d) Current and projected staffing levels.

(e) Turnover.

(f) Nature and extent of VISN and/or facility recruitment efforts.

(g) Academic levels and interest of eligible employees.

(2) National Issues

(a) Current and anticipated national VHA occupational shortages.

(b) Health care industry staffing trends.

(c) VHA and VA workforce demographics.

(d) Top management direction (e.g. program and mission changes).

(e) Significant changes in standards and requirements affecting employment.

10. PROGRAM ACCOUNTABILITY

b. Facilities and VISNs are accountable for ensuring that EDRP is implemented and administered at local VHA health care facilities in accordance with applicable law, VHA Directive 1021, this Handbook, and guidance from HCS-DRO.

c. HCS-DRO is accountable for ensuring that EDRP is administered

at the national level consistent with the law, provisions of the VHA

Directive 1021, Handbook, and top management direction. HCS-DRO is

also responsible for providing program guidance to facility and VISN officials.

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16. PROGRAM ANNOUNCEMENT

a. Announcements publicizing opportunities for employees to compete for education debt reduction awards must be prominently displayed at each facility through an open continuous announcement. At a minimum, this announcement should include the following information about the program:

- (1) the specific health professions that are covered by the facility under EDRP.
- (2) The eligibility requirements for participation in EDRP;
- (3) The selection criteria;
- (4) The application process;
- (5) The name, routing symbol, and telephone number of the local Program Coordinator; and
- (6) A statement emphasizing that the final decision on an EDRP award is contingent on the availability of EDRP funds, since the overall program funding process is centralized.

. . . .

21. DEFINITIONS

d. Eligible Employee. An employee must meet specific eligibility requirements to participate in EDRP. To be eligible for participation an employee must:

- (1) Be a recently appointed employee in VHA serving in one of the following positions: . . . (u) Medical technologist.